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IGNORANCE AND MISTAKE IN THE CRIMINAL LAW.

I.

IN the early days of English jurisprudence, maxims were regarded as inflexible and comprehensive rules of law to be strictly applied without regard to the reasons upon which they were based.¹ Modern courts and text-writers, however, attach much less importance to maxims;² for the experience of centuries has proved the inapplicability of maxims in many instances and their too extensive scope in others. As pointed out in an article by Professor Jeremiah Smith,³ there is much necessary difficulty in applying a maxim on account of its brevity and the fact that it is couched in a foreign language. Moreover, there is nothing in a maxim to indicate when it is to be applied. Although maxims vary in value and force,⁴ they may in most instances be regarded as but trite and brief statements of legal principles, which principles have become established by reason and custom. Difficulty arises when the maxim is treated as the principle rather than the statement of the principle. The degree of accuracy with which

¹ "The fourth ground of the law of England standeth in divers principles that be called in the law *maxims*, the which have been always taken for law in this realm; so that it is not lawful for any that is learned to deny them; for every one of those maxims is sufficient authority to himself." Doc. & Stud., Dial. I, c. 8.

"A maxime is a proposition to be of all men confessed and granted without prooffe, argument, or discourse." Co. Lit. 67 a.

² "It seems to me that legal maxims in general are little more than pert headings of chapters." ² Stephen, Hist. Crim. Law, 94, note 1.

"I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them." Lord Esher, M. R. in *Yarmouth v. France*, 19 Q. B. D. 647, 653.

³ 9 HARV. L. REV. 13.

⁴ *Ibid.*

the statement fits the principle determines the value of the maxim. Consequently, when a body of law has grown up around a maxim, it is desirable to ascertain the extent to which the decisions are based upon legal reasoning and analogy, and the extent to which they have been influenced by the maxim as such.

*Ignorantia juris non excusat, ignorantia facti excusat*¹ is a maxim familiar to the layman as well as to the lawyer. The purpose of this article is to discuss the origin of this maxim; to consider the scope of its influence in criminal jurisprudence;² to discover the extent to which the decisions referring to it are founded upon general principles; and finally to determine what is the state of the law to-day regarding *ignorantia juris* and *ignorantia facti* as defenses to criminal prosecutions. In order to do this with some degree of clearness it is necessary to define terms.

In the application of the maxim the word "*ignorantia*" has been translated as "ignorance" and as "mistake"; and these terms have generally been used interchangeably.³ It should be noted, however, that the two English words convey different ideas, which difference has been recognized in some instances.⁴ "Ignorance" may be defined as lack of knowledge; whereas a "mistake" is a wrong conclusion frequently caused by insufficient knowledge.⁵ Whether the criminality of a defendant is greater or less because his act is due to one rather than to the other of these will be discussed later.

¹ The maxim appears in various wordings. *Ignorantia legis neminem excusat*: Lush, J. in Reg. v. Mayor of Tewkesbury, 3 Q. B. 629, 639. *Ignorantia eorum, quae quis scire tenetur, non excusat*: 1 Hale P. C. 42. *Ignorantia excusatur, non juris sed facti*: 2 Bouvier, Law Dict. 355. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*: 4 Bl. Com. 27. *Ignorantia juris haud excusat*. Cooper v. Phibbs, L. R. 2 H. L. 149, 170.

² The application of the maxim in civil cases has been fully discussed and considered. See 2 Pomeroy, Eq. Jur., §§ 838-871; 7 Colum. L. Rev. 476; 6 Albany L. J. 103; 17 Cent. L. J. 422; 27 L. Mag. 90.

³ Bishop, New Crim. Law, § 292 *et seq.*; 4 Bl. Com. 27. The examples given in D. 22. 6. 9. support the use indicated. Austin treats *ignorantia* as meaning error or ignorance. Austin, Jur., § 688.

⁴ "Mistake may be said to be some unintentional act, omission or error arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence." Kerr, Fraud and Mistake, 396. See Story, Eq. Jur., § 110 and § 140, note 2, citing Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287. "The terms 'ignorance' and 'mistake,' in legal contemplation, do not import the same significance and should not be confounded. Ignorance implies a total want of knowledge in reference to the subject matter. Mistake admits a knowledge, but implies a wrong conclusion." Hutton v. Edgerton, 6 S. C. 485, 489. See also 17 Cent. L. J. 22.

⁵ Hutton v. Edgerton, 6 S. C. 485, 489.

"Law," which is regarded as the English equivalent of "jus," may be defined as a rule or standard of conduct which has been prescribed by competent authority, and which it is the duty of a judicial tribunal to apply and enforce.¹ "The inquiry whether there be any such rule or standard, the determination of the exact meaning and scope of it, the definition of its terms, and the settlement of incidental questions, such as the conformity of it, in the mode of its enactment, with the requirements of a written constitution, are all naturally and justly classed together and allotted to the same tribunal; and these are called questions of law."² "Facts" are natural phenomena, which are the subject of testimony, and to which the law is applied by or under the direction of a judicial tribunal.³

A question as to the application of law to facts is a question of law.⁴ Thus, whether a man and a woman are married is a question of law, since the status is determined by the application of the law of marriage to the conduct of the parties. Consequently, where a mistake is made in applying law to fact, the mistake is one of law.⁵ In such cases "the law is either extended to things which it was not intended to govern, or a fact is improperly withdrawn from its domain. In either case there is really an error as to the purport and scope of the law."⁶

Blackstone says that the maxim as to *ignorantia* is a rule of both the Roman and the English law;⁷ and it is universally accepted that the doctrine is of Roman origin.⁸ In the Digest⁹ the rule is stated, *juris quidam ignorantiam cuique nocere, facti vero ignorantiam non nocere*, and our maxim *ignorantia juris non excusat, ignorantia facti excusat* is treated as the equivalent.¹⁰ The context and the examples given in the Digest, to illustrate the maxim, show that it was applied solely to civil actions and had no application in

¹ See Thayer, Prel. Treat. on Ev., 192; Davis v. Ballard, 24 Ky. 563, 576.

² Thayer, Prel. Treat. on Ev., 193.

³ See Thayer, Prel. Treat. on Ev., 190-192. See also Barr v. Chicago, St. L. and P. R. R. Co., 10 Ind. App. 433, 437.

⁴ Thayer, Prel. Treat. on Ev., 252. Goudsmit, Pandects (Gould's translation), § 52 n.

⁵ Cf. Dixon, C. J., in Hurd v. Hall, 12 Wis. 125, 138.

⁶ Goudsmit, Pandects (Gould's translation), § 52 n.

⁷ 4 Com. 27.

⁸ 3 Greenleaf, Ev., 16 ed., § 20.

⁹ D. 22. 6. 9.

¹⁰ "Regula est, *juris ignorantiam cuique nocere* is the language of the Pandects. *Ignorantia juris non excusat* is the maxim of the common law." Kerr, Fraud and Mistake, 396.

the law of crimes. Writers on the Roman Law treat the doctrine of *ignorantia* set forth in the Digest as applicable solely in the law of civil actions.¹ The reason given in the Digest, why *ignorantia juris* will not excuse, while *ignorantia facti* will, is that the law is certain and capable of being ascertained, while the construction of facts is difficult for even the most circumspect.² Under modern conditions, at least, it would hardly be seriously maintained that the former reason is sound.³

In the English law the earliest case found, in which the doctrine of *ignorantia* is considered, was decided in Hilary Term, 1231.⁴ In this case Robert Waggehastr' was summoned to answer one Wakelinus for breach of a fine committed by entering upon the land in question, which was in the possession of the mother of Wakelinus. Robert pleaded as a defense that he entered upon the land under the belief that the estate belonged to him, which belief was founded upon the advice of counsel. The court held that this was no defense, and ordered Robert to be imprisoned for breach of the fine.

Other cases illustrating the early use of the maxim, and showing the development of the doctrine of *ignorantia*, are worthy of notice.

Vernon's Case,⁵ decided in 1505, was an action of trespass brought against the defendants for carrying off the plaintiff's wife. The defendants justified on the ground that they were accompanying the woman to Westminster to sue for a divorce to ease her conscience. Objection was made to the plea on the ground that Westminster was not the proper place to take the woman for a divorce, but the plea was held good, "for perhaps they did not have knowledge of the law as to where the divorce should be sued."⁶

The Doctor and Student Dialogues,⁷ published in 1518, state the following rule: "Ignorance of the law (though it be invin-

¹ Hunter, Roman Law, 3 ed., 660; Domat, Civil Law, §§ 1224-1240; Amos, Roman Civil Law, 133; Curwin, Manual of Civil Law, 2 ed., 111; Goudsmit, Pandects (Gould's translation), § 52; Sandar, Institutes of Justinian, 388.

² D. 22. 6. 2.

³ "That any actual system is so knowable, or that any actual system has ever been so knowable, is so notoriously and ridiculously false that I shall not occupy your time with proof of the contrary." Austin, Jur., § 688.

⁴ Reported in Bracton's Note Book, Maitland's ed., pl. 496.

⁵ Y. B., 20 Hen. VII, f. 2, pl. 4.

⁶ "Car par cas ils n'avoïent conusance de le Ley on le divorce seroit sue."

⁷ Dial. II., c. 46.

cible) doth not excuse as to the law but in a few cases; for every man is bound at his peril to take knowledge what the law of the realm is, as well the law made by statute as the common law; but ignorance of the deed, which may be called the ignorance of the truth of the deed, may excuse in many cases." The doctrine was regarded as applicable in both civil and criminal cases.

In *Brett v. Rigden*,¹ 1568, a case involving the construction of a deed, Manwood, J., said: "It is to be presumed that no subject of this realm is miscognisant of the law whereby he is governed. Ignorance of the law excuses no one."

In *Mildmay's Case*,² 1584, an action was brought against the defendant for slandering the plaintiff's title, by stating that the title to the land was in some other person. The court held that, as the defendant had taken upon him a knowledge of the law, he must be bound, as "*ignorantia juris non excusat*."

In *Manser's Case*,³ 1584, an action of debt was brought against the defendant. It appeared in evidence that, by the terms of an agreement between the parties, the defendant and his son were to sign a certain release to the plaintiff. This release was prepared by the plaintiff, who then demanded that the defendant and his son sign the same. "Because his son was not lettered and could not read, the said John prayed the plaintiff to deliver it to him, to be showed to some man learned in the law, who might inform him if it was according to the condition." This the plaintiff refused to do, and brought action. The court decided that the son was not entitled to time to consult counsel, but should have signed the release at once. "*Ignorantia est duplex, viz. facti et juris. Ignorantia juris non excusat*."

King v. Lord Vaux,⁴ 1613. An indictment was brought against the defendant for refusing to take the oath of allegiance. The defendant, when arraigned, desired counsel to speak for him, "he being very ignorant of the proceedings of the Lawes of this Land." Hubbert, the Attorney-General, replied to this, "that there was no need of Councell for to be assigned to him in this case, for though he do pretend ignorance in himself in the laws of the Land (of which no Subject of the Land ought to be ignorant), for that his ignorance of the law will not excuse him, if so be that he do offend against the law." The court concurred in this view.

In *Levett's Case*,⁵ 1638, the defendant, under the mistaken belief

¹ 1 Plowd. 342.

² 1 Co. Rep. 175.

³ 2 Co. Rep. 3.

⁴ 1 Bulst. 197.

⁵ Cro. Car. 538.

that there were burglars in his house, killed a woman of whose presence he was ignorant. The court held that the defendant was not guilty of manslaughter, "for he did it ignorantly without intention of hurt to the said Frances."

Sir Matthew Hale, in his Pleas of the Crown,¹ published in 1680, said: "Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any that is of the age of discretion and *compos mentis* from the penalty of the breach of it; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do; *Ignorantia eorum quae quis scire tenetur non excusat*. But in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary." This may well be considered as the basic statement of the law of England as to *ignorantia*, and is generally cited as a leading authority for the present law on the subject.²

It is interesting to observe how the scope of the maxim, as indicated in the Doctor and Student Dialogues, differs from that set forth in the *Corpus Juris Civilis*. By the Roman Law the rule as to *ignorantia juris* did not apply to certain classes of individuals,³ because it was considered that these individuals, by reason of their status or condition, would not have a knowledge of the law. Those exempted were persons under twenty-five years,⁴ women,⁵ soldiers,⁶ and peasants and other persons of small intelligence.⁷ Austin points out that these persons were not exempt where their ignorance was as to some portion of the *jus gentium* as distinguished from the *jus civile*. "For the persons in question are not generally imbecile, and the *jus gentium* is knowable *naturali ratione*. With regard to the *jus civile* or to those parts of the Roman Law which are peculiar to the system, they may allege with effect their ignorance of the law."⁸

In the Doctor and Student Dialogues it is expressly stated that infants cannot avail themselves of ignorance as a defense.⁹ It is likewise stated that "knights and noblemen that are bound most properly to set their study to acts of chivalry for defense of the realm, and husbandmen that must use tillage and husbandry for

¹ 1 Hale, P. C. 42.

² See Broom, Legal Maxims, 7 ed., 266; Wharton, Crim. Ev., § 723.

³ *Quibus jus ignorare permisum est*. D. 22. 6. 9.

⁴ D. 22. 6. 9.

⁵ D. 22. 6. 9.

⁶ D. 22. 6. 9. 1.

⁷ D. 49. 14. 2. 7.

⁸ Austin, Jur., § 693.

⁹ Dial. II. c. 46.

the sustenance of the commonalty, and that may not by reason of their labor put themselves to know the law," are not discharged by ignorance of the law.¹

By the Digest² it is indicated that one, who has had no opportunity to consult counsel, should be excused for ignorance, but, it is said in the Dialogues,³ that if one acts on the improper advice of counsel, this does not constitute a defense.

II. IGNORANCE AND MISTAKE OF FACT.

It is a fundamental principle of the criminal law, for which no authorities need be cited, that the doer of a criminal act shall not be punished unless he has a criminal mind. An exception to this exists in a case where, by statute, the legislature either expressly or impliedly indicates that no such state of mind is necessary. Some offenses require a specific intent — a special state of mind which is an essential element of the criminal act. Thus the crime of larceny is not committed unless the defendant has the *animus furandi*.

Whenever a person, having the ability of reasoning to a conclusion,⁴ does a criminal act, he has the criminal mind. In order that one may be able to reason to a conclusion, he must have the power or capacity of reasoning, and the *data* upon which to base the reasoning. There must be a process and the materials upon which the process can operate. A defect in the process or in the materials will affect the result.

Whenever, then, the defendant does not have the ability to reason as considered above, he does not have the criminal mind. Infants under seven and lunatics are exempted from criminal responsibility, because they have not the power of reasoning. One who commits a criminal act under mistake of fact has a defense, because he has wrong or insufficient *data* for reasoning.⁵

¹ Dial. II. c. 46.

² D. 22. 6. 9.

³ Dial. I. c. 26.

⁴ The word "voluntarily" is usually employed in this connection, but as the term is capable of somewhat varying meanings, it was in this instance thought wise to express the idea in full.

"Doing the act voluntarily is evidence of the unlawful intent, and no other is requisite." Clopton, J., in *Mullens v. State*, 82 Ala. 42.

⁵ "But in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary." 1 Hale, P. C. 42.

"The act of the insane person was not 'voluntary'; it was impelled by disease. Neither was the act of the woman marrying under mistake 'voluntary'; it was impelled by the

The defendant's criminality must be determined by his state of mind toward the situation in which he acted, and his state of mind will depend upon his impression of the facts. Hence he should be dealt with as if the facts were what he believed them to be. Then if, according to his belief concerning the facts, his act is criminal, he has the criminal mind as distinguished from motive, desire, or intention, and should be punished. If, on the other hand, his act would be innocent provided the facts were what he believed them to be, he does not have the criminal mind, and consequently should not be punished for his act.

Ignorance and mistake of fact,¹ therefore, are important in so far as they negative the criminal mind.²

There is no saving power in mistake itself. The fact that defendant says "I was mistaken" does not necessarily indicate that he is not guilty. It is only by showing the absence of the criminal mind due to his mistake that he can escape punishment for his criminal act. It follows that the mistake is no defense, where there is a prosecution under a statute, in which the legislature has indicated that no criminal mind is necessary for a conviction of the crime created by the statute.³

mistake. This is so even in civil affairs; for if one enters into a contract through mistake of fact, there is no 'voluntary' concord of minds, and the formal undertaking is not binding." Joel Prentiss Bishop in 4 So. L. Rev. (N. S.) 153.

"Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy." Cave, J., in *Reg. v. Tolson*, 23 Q. B. D. 168.

¹ There is no difference in result between ignorance of fact and mistake of fact. If the defendant is unaware of the existence of a fact, he reasons without reference to that fact, and hence he should be treated as if the fact did not exist. When the defendant has a mistaken view of a fact, he reasons with reference to this view, and his responsibility must be tested in the light of his belief. In either case the defendant has a wrong impression of the situation in which he acts.

² In *Levett's Case*, Cro. Car. 538, the court, in holding that the defendant would not be guilty of manslaughter where he acted in ignorance of a material fact, said "for he did it ignorantly without intention of hurt to the said Frances."

"Now here, although the proximate ground is ignorance or error, the ultimate ground is the absence of unlawful intention or unlawful inadvertence." Austin, Jur., § 687.

³ *Reg. v. Bishop*, 5 Q. B. D. 259; *Com. v. Emmons*, 98 Mass. 6; *Garver v. Oklahoma*, 49 Pac. 470; *State v. Kelly*, 54 Oh. St. 166. Except where the legislature expressly or impliedly indicates in a statute that no criminal mind is necessary, the existence of such mind is indispensable to the securing of a conviction under the statute. *Reg. v. Tolson*, 23 Q. B. D. 168; *State v. Brown*, 38 Kan. 390. In the article by Mr. Bishop, cited *supra*, he denies that the legislature ever dispenses with the requirement of criminal mind, and criticizes the cases where the defendant was held liable under a statute

In the following instances, in which the mistake does not negative the criminal mind, the defendant has no defense:

I. Though the defendant is mistaken, the act done is criminal under the facts as believed by him.¹

II. The defendant, while engaged in the commission of one criminal act, does another criminal act under ignorance or mistake of fact.² Here the criminal mind is carried over from the first act.

III. Where an act, itself immoral, is made a crime by statute when done under certain circumstances, it has been held that mistake as to the circumstances will not excuse one who does the act covered by the statute. There is some confusion among the authorities as to whether this result is reached, because under such a statute no criminal mind is necessary, or because the immoral intent will under the circumstances establish the culpability.³

IV. Defendant was negligent. Though it is not correct to say that negligence is the same as intent, yet negligence supplies

for selling adulterated food not knowing of the adulteration, claiming that the criminal mind should be proved in such cases.

Where the act covered by the statute is in the nature of a public tort rather than of a crime, it would seem clear that no criminal mind need to be proved.

In *Com. v. Mash*, 7 Met. (Mass.) 472, a woman was indicted for bigamy. The defendant married the second time under the mistaken belief that her former husband was dead. This was held to be no defense on the ground that no criminal mind was necessary in order to secure a conviction under the statute. A similar result was reached in *Com. v. Thompson*, 11 Allen 23. These cases are criticized in 4 So. L. Rev. (N. S.) 153.

In England there is an interesting series of *nisi prius* cases in which a mistaken belief in the death of the husband was set up as a defense to a prosecution of the wife for bigamy. *Martin, B.*, in *Reg. v. Turner*, 9 Cox C. C. 145, and *Cleasby, B.*, in *Reg. v. Horton*, 11 Cox C. C. 670, held that the mistake was a good defense. In *Reg. v. Gibbons*, 12 Cox C. C. 237, *Brett, J.*, after consulting with *Willes, J.*, decided, that the result in the two preceding cases was incorrect, and instructed the jury that the mistake was no defense. *Denman, J.*, in *Reg. v. Moore*, 13 Cox C. C. 544, discussed the three preceding cases and said that he preferred the view of the first two. In *Reg. v. Bennett*, 14 Cox C. C. 45, *Bramwell, L. J.*, followed *Reg. v. Gibbons*, instructing the jury to convict notwithstanding the mistake.

¹ *Reg. v. Lynch*, 1 Cox C. C. 361; *McGehee v. State*, 62 Miss. 772; *Reg. v. Smith, Dears. C. C.* 559. In these three cases the defendant assaulted the prosecuting witness under the belief that he was another person.

² "If A meaning to steal a Deere in the Park of B shooteth at the Deer, and by the glance of the arrow killeth a boy that is hidden in a bush; this is murder for that the act was unlawful, although A had no intention to hurt the boy, nor knew not of him." 3 Co. Inst. 56.

See article on "Crimes by Mistake" in 21 Ir. L. T. 213.

³ In *Com. v. Murphy*, 165 Mass. 66, and *State v. Newton*, 44 Ia. 45, where statutes made it a criminal offense to have intercourse with any girl under a certain age, it was held that mistake as to the girl's age would be no defense, as no criminal mind was

the place of intent, and, like intent, makes the mind criminal.¹ Hence, if the defendant is negligent a mistake will not excuse, for mistake is material only as it negatives a criminal mind, and here this is shown *aliunde*.²

The defendant's mind is equally criminal when he does a criminal act through negligence or when the mistake under which the defendant acted was due to negligence. Therefore a negligent mistake can be no defense.

The statement is often made by judges and commentators that a mistake of fact, in order to avail as a defense, must be "honest and reasonable."³ "Honest" in this connection can only mean that the defendant did in truth believe the facts to be different from what they were. It is, therefore, a truism to say that the mistake must be honest.

Must the mistake be reasonable? An act is reasonable in law when it is such as a man of ordinary care, skill, and prudence would do under similar circumstances. To require that the mistake be reasonable means that if the defendant is to have a defense, he must have acted up to the standard of an average man, whether the defendant is himself such a man or not. This is the application of an outer standard to the individual. If the defendant, being mistaken as to material facts, is to be punished because his mistake is one which an average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist. Such a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of lack of intelligence. If the mistake, whether reasonable or unreasonable, as

necessary under the statutes in question. In *Reg. v. Prince*, L. R. 2 C. C. 154, a statute made it an offense to take a girl under fourteen years out of the lawful possession of her father. The defendant did this, believing the girl to be over fourteen years. The court expressly admitted that the criminal mind was necessary, but said the defendant acted at his own risk. In *Lawrence v. Com.*, 30 Grat. (Va.) 845, a statute made it criminal to have intercourse with a girl under twelve years. The court held that it was no defense that the defendant believed the girl to be older, as he acted at his peril. In *State v. Houx*, 109 Mo. 654, the defendant was indicted under a statute for having intercourse with a girl under a certain age. Here the court in holding conviction proper said that mistake as to the girl's age was no defense, as the immoral intent supplied the place of the criminal intent.

¹ 1 Foster, C. L. 262; *Com. v. Rodes*, 6 B. Mon. (Ky.) 171; *Rex v. Pittwood*, 19 T. L. R. 37; *Reg. v. Lowe*, 3 C. & K. 123.

² Bishop says, there is "little difference except in degree between a will to do a wrongful thing and an indifference whether it is done or not." New Crim. Law, § 313.

³ Cave, J., in *Reg. v. Tolson*, 23 Q. B. D. 168, 180; Kenny, *Outlines Crim. Law*, Am. Ed. 60.

judged by an external standard, does negative the criminal mind, there should be no conviction.

The requirement, that the mistake be reasonable in order to be a defense, at first sight appears the same as the rule that if the defendant be negligent his mistake will not avail. This similarity, however, is only seeming, for the test of negligence in the criminal law is not whether the defendant used the care of a reasonable man—an outer standard—but whether he used the care which appeared proper to him under the circumstances, that is “Did he do his best according to his own lights?”¹ In other words, the test is: Did the defendant act up to his own standard?²

An examination of the authorities shows that the courts often say (not infrequently without consideration) that the mistake must be reasonable.³ In some cases the question is discussed and the judges distinctly lay down the same proposition.⁴ In other cases “reasonableness” is not mentioned, and an “honest mistake” is stated to be sufficient.⁵

¹ See 12 HARV. L. REV. 428.

² Reg. v. Wagstaffe, 10 Cox C. C. 530. See Reg. v. Downes, 1 Q. B. D. 25; 12 HARV. L. REV. 428; 15 *ibid.* 500; 17 *ibid.* 347. There is a *dictum* in Com. v. Pierce, 138 Mass. 165, 178, to the effect that the care of a reasonable prudent man under similar circumstances should be the test in criminal as well as in civil cases.

³ Steinmyer v. People, 95 Ill. 383; Rineman v. State, 24 Ind. 80; Com. v. Power, 7 Met. (Mass.) 596; Com. v. Presby, 14 Gray (Mass.) 65; People v. Welch, 71 Mich. 548.

⁴ Gordon v. State, 52 Ala. 308; Stern v. State, 53 Ga. 229; Goetz v. State, 41 Ind. 162; Mulreed v. State, 107 Ind. 62.

⁵ Vaughan v. State, 83 Ala. 55; Myers v. State, 1 Conn. 502; Baker v. State, 17 Fla. 406; Causey v. State, 79 Ga. 564; Brown v. State, 24 Ind. 113; State v. Barrackmore, 47 Ia. 684; Com. v. Wood, 111 Mass. 408.

In Dotson v. State, 62 Ala. 141, the court says the mistake must be “without fault or carelessness.” This seems to be the proper view.

The question whether a mistake of fact must be reasonable is important when self-defense is set up as an excuse. In such a case the defendant seeks to escape liability, not because some element of guilt is lacking, but because he claims an excuse. It is held that a defendant may avail himself of this defense when he acted under a mistaken apprehension of serious bodily harm.

Here it may be held that the mistake must be reasonable; for the defendant does not offer the mistake as negating the criminal mind; but admitting this maintains that the state, because of circumstances, should not punish him. Since he asks to be forgiven when admittedly he had a criminal mind, it may not be improper to hold him to an external standard.

Bishop, however, claims that the test of the mistake in such cases should be “without fault or carelessness,” rather than “reasonable.” New Crim. Law, § 305. 2.

The Supreme Court of Tennessee in Grainger v. State, 5 Yerg. (Tenn.) 459, held that if a man through cowardice, without reasonable grounds, believes himself in danger of serious bodily injury he may kill. The doctrine of this case is expressly repudiated in

Where the defendant claims to escape criminal liability because he acted under a mistake of fact, there seems to arise, according to some judges, a question as to the burden of proof: whether it is upon the defendant to establish the mistake, or upon the prosecution to disprove the mistake, after it has been set up by the defendant. Although it is not necessary for the prosecution to aver the general criminal intent in the indictment,¹ yet, since the defendant's culpability depends upon such intent, its existence is an essential part of the prosecution's case, and must be proved when questioned by the defendant. Since the prosecution must prove beyond a reasonable doubt all the elements of the defendant's guilt,² there can be no conviction, when the defendant succeeds in creating a reasonable doubt.³ Hence, when the defendant has produced enough evidence of mistake to cast a reasonable doubt upon the existence of the criminal mind, the prosecution should not succeed unless it removes this doubt by disproving the mistake, or by showing that the mistake, under the circumstances of the case, did not negative the criminal mind. The burden to prove the defendant's guilt, which is upon the prosecution at the start, does not shift.⁴

Some courts have held, however, that the defendant has the burden of proving that he was mistaken.⁵

Shorter v. People, 2 Comst. (N. Y.) 193, and most cases hold that the defendant may excusably kill only when his mistaken apprehension is reasonable.

¹ Com. v. Hersey, 2 Allen (Mass.) 173; Beale, Crim. Pl. & Prac. § 135; Bishop, Crim. Proced., §§ 278-281.

² Starkie, Ev., 865; Beale, Crim. Pl. & Prac., § 292; 1 Bishop, Crim. Proced., § 818; Castle v. State, 75 Ind. 146.

³ Beale, Crim. Pl. & Prac., § 289; Thayer, Prel. Treat. Ev., 362, 363; Shaw, J., in Com. v. Webster, 5 Cush. 295, 320.

⁴ Com. v. Kimball, 41 Mass. 366; U. S. v. Gooding, 25 U. S. 460; Dubrose v. State, 10 Tex. App. 230.

When the defendant sets up *alibi* as defense, he denies one of the essentials of guilt, viz., that he was present at the fact. In such a case the defendant need not prove his absence, but the prosecution must prove his presence. Beale, Crim. Pl. & Prac., § 289; Wigmore, Ev., § 2512, and note containing collection of authorities.

Such defenses as mistake and *alibi*, each of which denies one of the elements of guilt, must not in this connection be confounded with defenses of an affirmative character under which the defendant admits the commission of the crime but claims exemption from punishment because of some excusing fact, such as self-defense. In such cases, though the evidence would be admissible under the general plea of not guilty, nevertheless, the defense in its essence is by way of confession and avoidance, and the defendant may properly be required to establish such defense. Beale, Crim. Pl. & Prac., § 291. The courts disagree as to the extent of the defendant's burden. See Wigmore, Ev., § 2512, n.

⁵ Marshall v. State, 49 Ala. 21; Bain v. State, 61 Ala. 75; Goetz v. State, 41 Ind.

A ground of defense that may appropriately be considered under the present title is "insane delusion." This may be defined as an unreasoning belief in non-existent facts, which belief is persistent and ineradicable, continuing notwithstanding evidence of the senses to the contrary.¹

In M'Naghten's Case² the fourth question put by the House of Lords to the judges was: "If a person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused?" To which the judges replied: "Making the assumption that he labors under such partial delusions only and is not in other respects insane, we think he must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real." This lays down the same test for insane delusion as for ordinary mistake of fact. This is a satisfactory test in cases where if the delusion were true the act done would be no crime. The criminal mind is as much negatived where the impressions are pure fictions of a disordered brain as where the impressions differ but partly from the facts as they really exist. The decisions are in accord with this view.³

There is, however, reason for questioning whether the converse of the above should hold; that is, whether the defendant should necessarily be punished when the act done would be criminal if the facts were as they appeared in the delusion to be. For example, take the case of a defendant who believed that another man had stolen his watch, and, acting under this delusion, killed the man. By the test of the judges there would be no defense in such a case, and this would be correct under the assumption made by the judges. The correctness of the test, therefore, depends upon the validity of the assumption that a man may act under an insane delusion and be perfectly sane in all other respects. Writers on medical jurisprudence strenuously deny that a man suffering from an insane delusion can be sane in all other particulars.⁴ Accord-

162; *Squire v. State*, 46 Ind. 459. On the strength of these four cases Bishop states the rule to be that "the burden of proof is on the party setting up the mistake to show it and its innocence." *New Crim. Law*, § 302. 3. Further cases in accord with this view are *Farbach v. State*, 24 Ind. 77; *State v. Brown*, 16 Pac. 259 (Kan.) (*semble*).

¹ See *Mercier*, *Criminal Responsibility*, 116, 117; *Bundy v. McKnight*, 48 Ind. 502, 512; *In re White*, 121 N. Y. 406, 413; *Guiteau's Case*, 10 Fed. 161, 171.

² 10 Cl. & F. 200.

³ *Com. v. Rogers*, 7 Met. (Mass.) 500; *Guiteau's Case*, 10 Fed. 161; *Smith v. State*, 55 Ark. 259.

⁴ "There is not, and there never has been, a person who labors under partial delusion, and is not in other respects insane." *Mercier*, *Criminal Responsibility*, 174. To

ing to this latter view the delusion, though immaterial as a mistake, is strong evidence of general derangement which may exempt the defendant from responsibility.¹

From this it follows that, in considering whether the defendant shall be convicted when he did a criminal act under an insane delusion, the dual character of delusion, as mistake and as a symptom of insanity, must be carefully borne in mind. This has been overlooked by some judges and writers on the subject, and the test of mistake is applied to delusion under the assumption that the defendant is in all other respects sane.²

In order that the defendant may escape criminal liability because he acted under an insane delusion it is clear that the standard of an ordinary, reasonable man cannot be applied, because the definition of delusion indicates that the belief of the defendant is not in accord with the impression which would ordinarily be obtained from the situation by the use of the senses. A man acting under an insane delusion is not an average, reasonable man. This seems to illustrate further the contention that a mistake of fact need not necessarily be reasonable in order to be a good defense.

III. IGNORANCE AND MISTAKE OF LAW.

The courts, following literally the doctrine of *ignorantia juris* as proclaimed by the maxim, have refused to accept ignorance, or mistake, of law as a defense.³ If an element of law enter into the

the same effect see 2 Stephen, Hist. Crim. Law, 157, 161; Ray, Med. Jur. of Insan., 283; article by Morton Prince, M.D., in 49 Jour. Amer. Med. Ass'n, 1643, 1645.

¹ 2 Stephen, Hist. Crim. Law, 161; Bishop, New Crim. Law, § 393.

² "A man may be insane as to certain objects and on certain subjects and perfectly sane with respect to other objects and on other subjects." Clark and Marshall, Crim. Law, § 96. Also Harris, Crim. Law, 3 ed., 24; State v. Huting, 21 Mo. 464; State v. Mewherter, 46 Ia. 88, 100. In Dew v. Clark, 3 Add. Ecc. 79, Sir John Nichol said that the contention that the law of England never deems a party sane and insane at the same time upon different subjects is incorrect. This view is approved in Buswell, Insanity, § 15.

³ Ignorance of law was held no defense in these cases: Rex v. Bailey, R. & R. 1; Rex v. Esop, 7 C. & P. 456; Rex v. Crawshaw, 1 Bell C. C. 303; Barronet's Case, 1 E. & B. 1; Schuster v. State, 48 Ala. 199; Winehart v. State, 6 Ind. 30; Jellico Coal Min. Co. v. Com., 96 Ky. 373; Grumbine v. State, 60 Md. 355; Com. v. Everson, 140 Mass. 292; Whitton v. State, 37 Miss. 379; State v. Wilforth, 74 Mo. 528; State v. Halsted, 39 N. J. L. 402; State v. Foster, 22 R. I. 163; Walker v. State, 2 Swan (Tenn.) 287; Brig Ann, 1 Gall. (U. S.) 62; U. S. v. Fourteen Packages, Gilp. (U. S.) 235; The Joseph, 8 Cranch (U. S.) 451; Wilson v. The Brig Mary, Gilp. (U. S.) 31. See notes 2 and 3 on p. 90.

It has been suggested in several instances that ignorance of law may properly be

mistake of defendant, such mistake is held to be no defense. There is, however, an exception to this general rule. When a specific criminal intent, as distinguished from the criminal mind, is a requisite element of the offense, and such intent is negated by ignorance or mistake, it is held that the defendant shall not be convicted, notwithstanding the maxim.¹ Although the writer fully recognizes that the courts enforce, and commentators approve, the general doctrine that mistake of law is no defense, nevertheless, it is suggested that on principle and analogy a different result may and

ground for pardon: *Rex v. Bailey*, R. & R. 1; or for reducing sentence, *Atkins v. State*, 95 Tenn. 474.

Mistake of law was no defense in the following: *Hoover v. State*, 59 Ala. 57; *Frasier v. State*, 112 Ga. 13; *Derixson v. State*, 65 Ind. 385; *Davis v. Com.*, 76 Ky. 318; *State v. Whitcomb*, 52 Ia. 85; *Com. v. Bagley*, 7 Pick. (Mass.) 279; *Pisar v. State*, 56 Neb. 455; *Hamilton v. People*, 57 Barb. (N. Y.) 625; *Medrano v. State*, 22 S. W. 684 (Tex.).

Ignorance or mistake of law due to the advice of a public officer is held to be no defense. *Wilson v. The Brig Mary*, Gilp. (U. S.) 31; *The Joseph*, 8 Cranch (U. S.) 451; *Hoover v. State*, 59 Ala. 57; *Hamilton v. People*, 57 Barb. (N. Y.) 625; *State v. Foster*, 22 R. I. 163.

¹ "If A thinking he have title to the horse of B seisseth it as his own this makes it no felony but a trespass because there is a pretense of title." 1 Hale P. C. 508.

Larceny: *Reg. v. Reed*, 1 C. & M. 306; *Reg. v. Wade*, 11 Cox C. C. 549; *Morningstar v. State*, 55 Ala. 148; *State v. Bond*, 8 Ia. 540; *Com. v. Stebbins*, 8 Gray (Mass.) 492; *State v. Homes*, 17 Mo. 379; *People v. Husband*, 36 Mich. 306. Malicious trespass: *Palmer v. State*, 45 Ind. 388; *State v. Newkirk*, 49 Mo. 84; *State v. Hanks*, 66 N. C. 612; *Com. v. Cole*, 26 Pa. St. 187; *Dye v. Com.*, 7 Grat. (Va.) 662. Maliciously setting fire to furze: *Reg. v. Towse*, 14 Cox C. C. 327. Malicious damage: *Reg. v. Matthews*, 14 Cox C. C. 5; *Reg. v. Croft*, 111 C. C. C. Sess. Pap. 202; *Reg. v. Langford*, 1 C. & M. 602; *Goforth v. State*, 8 Humph. (Tenn.) 37. Robbery: *Rex v. Hall*, 3 C. & P. 409; *State v. Hollyway*, 41 Ia. 200. Assault with intent to rob: *Reg. v. Boden* 1 C. & K. 395. Embezzlement: *Reg. v. Norman*, 1 C. & M. 501; *Beaty v. State*, 82 Ind. 228; *State v. Reilly*, 4 Mo. App. 392. Maliciously secreting property: *Hampton v. State*, 10 Lea (Tenn.) 639. Wilfully removing official seal: *U. S. v. Three Railroad Cars*, 1 Abb. U. S. 196. Perjury: *Rex v. Crespigny*, 1 Esp. 280; *Hood v. State*, 44 Ala. 81. Corruptly granting license: *People v. Jones*, 54 Barb. (N. Y.) 311. Feloniously taking deed from registry: *Com. v. Weld*, *Thacher C. C.* 157. Cutting, with intent to remove, timber from government lands: *U. S. v. Shuler*, 6 McLean (U. S.) 28. Extortion (corrupt): *State v. Porter*, 3 Brev. (S. C.) 175; *State v. Reeves*, 15 Kan. 396; *Com. v. Shed*, 1 Mass. 227. Knowingly rejecting vote: *Com. v. Lee*, 1 Brewst. (Pa.) 273. Knowingly receiving illegal vote: *Byrne v. State*, 12 Wis. 577; *State v. McDonald*, 4 Har. 555. Fraudulent voting: *Com. v. Algar*, *Thacher C. C.* 412; *Com. v. Bradford*, 9 Met. (Mass.) 268; *State v. Macomber*, 7 R. I. 349. Falsely acting as public officer: *Hall v. People*, 21 Mich. 456. Knowingly erasing the name of a voter: *State v. Smith*, 18 N. H. 91. Wilfully giving false answer at election: *Reg. v. Dods-worth*, 8 C. & P. 218.

Contra; Malicious shooting: *Rex v. Bailey*, R. & R. 1. Murder: *Rex v. Thomas*, East. T. 1816, MS.; *Weston v. Com.*, 111 Pa. St. 251. Larceny: *State v. Welch*, 73 Mo. 284. Fraudulent voting: *State v. Boyett*, 10 Ired. (N. C.) 336, 343, 344.

should properly be reached in certain cases where a criminal act is committed under a misconception of the law.

There are two classes of cases in which a man may act under a misconception of the law. In the first he does an act in ignorance that the law makes such act criminal. Here the misconception is due to lack of knowledge, and may be termed "ignorance of law," as when a man already married marries again in ignorance that a second marriage is unlawful. In the second case the defendant does an act under a misconception of the legal effect of certain facts; that is, he gets a wrong view of a situation as a result of the improper application of law to facts. Here an act, neutral in itself, becomes criminal by reason of some preceding situation or status. Thus, when a man marries, the criminal character of the marriage depends upon the question whether the man was already married. Such a question, as already shown,¹ is a question of law, because it deals with the application of law to facts. This second case may be termed "mistake" as distinguished from "ignorance" of law.

Under what has been termed "ignorance of law" may be grouped two situations. The first is when a man does an act without giving any attention to the law as such, in what may be termed unconsciousness that the law governs such a case;² the second, when he considers the law but believes that it does not govern the particular case.³ In each instance he does an act in ignorance that the law has made the act criminal.

It is the contention at this point that there is a distinction, so far as legal effect is concerned, between the two classes of cases designated by the headings "ignorance of law" and "mistake of law." This distinction is based upon the ground that ignorance of law does not negative the criminal mind, whereas mistake of law does. When a person, not insane, does an act, knowing its physical character, if the act is criminal the doer of the act has the criminal mind.⁴ Intending an act which the law has made criminal is the criminal mind. This is so even when the defendant has not the means or opportunity of knowing that the law exists which makes his act criminal,—for example, when the act was committed so short a time after the passage of a statute that the defendant could not possibly

¹ P. 77, *infra*.

² *Rex v. Esop*, 7 C. & P. 456; *Rex v. Crawshaw*, 1 Bell C. C. 303.

³ *Rex v. Soleguard*, Andr. 231; *Reg. v. Price*, 3 P. & D. 421.

⁴ See p. 81, *infra*.

have known of it.¹ The defendant has the criminal mind in such a case.² It follows that the reason why ignorance of the criminality of the act does not excuse is that in such a case the defendant has the criminal mind. The rule of law embraced in the language of the maxim is the fundamental rule that criminality is determined by the criminal mind.

It is a common statement that the rule concerning ignorance of law exists apart from the general principles of criminal jurisprudence, and must rest upon policy alone.³ Policy, however, should be invoked to support propositions of law only when these cannot be explained by general principles. At best policy is vague, and courts may well differ as to when it exists. It is also sometimes said that ignorance of law will not excuse, because "every one is presumed to know the law."⁴ If this presumption can be taken to mean that most persons do know the law, it is on its face absurd.⁵ If it means that in this connection it is immaterial whether one knows the law or not, it may be asked why this is so. The only answer is, that despite the ignorance all the elements of criminality are present.

When, on the other hand, a person does an act under an erroneous idea of a situation reached by applying law to facts, if the act done would not be criminal provided the situation were as he believed it, the defendant should have a good defense. He is in the same position, so far as his state of mind is concerned, as though the situation regarding which he was mistaken were one solely of fact. By applying the test which governs mistake of fact the defendant in the above case does not have the criminal mind.

The difference in legal effect between an act done in ignorance of law, and an act due to a mistake of law, may be illustrated by the following hypothetical cases. Suppose a statute making tres-

¹ Brig Ann, 1 Gall. (U. S.) 62. See *Oakland v. Carpentier*, 21 Cal. 642, 665.

² This result seems harsh, since the defendant was morally guiltless. The criminal mind does not, however, embrace any idea of moral wrong. A defendant may be guilty of a crime though his motive was morally commendable. *Reg. v. Sharpe*, 7 Cox C. C. 214.

³ Austin, Jur., § 689; Holmes, Com. Law, 48; Wharton, Crim. Ev., § 723; Valentine, J., in *State v. Brown*, 16 Pac. 259, 260 (Kan.).

⁴ 1 Hale P. C. 42; 1 Hawkins P. C., Curwood's ed., 5, § 14, n.

⁵ "Now to affirm 'that every person may know the law' is to affirm what is not. And to say 'that his ignorance should not excuse him because he is bound to know' is simply to assign the rule as a reason for itself." Austin, Jur. § 669. See also 2 Stephen, Hist. Crim. Law, 114.

pass upon land criminal. Under this statute the criminal mind must be present in order to make the defendant culpable.¹ In the first case A enters upon the land of B in ignorance that the statute makes such entry unlawful. Here A would be guilty, as he has, for the reasons already given, the criminal mind. In the second case A believes that the title to certain land² is in him, and he enters upon the land, which, however, belongs to B. Here A should not be convicted under the statute, because, supposing the situation to be what he thought it, his act could not have been criminal.

In connection with the contention that the defendant no more has the criminal mind when the situation, with reference to which he acted, resulted from the application of law to facts than when the situation was one of fact solely, suppose, as above, a statute making trespass upon realty criminal. A and B own adjoining estates. Through each estate a private road leads from the highway to the owner's house. A while driving along the public road determines to turn into his own lane, but by mistake turns into the lane of B. In the second case A goes into a certain field which he thinks belongs to him, but the title is in B. There clearly could be no conviction of A in the first case, as he acted under a mistake of fact which negated the existence of the criminal mind. The mental attitude of the defendant in the second case was the same as in the first case. Hence he should have a defense in the second case.

Another case may well be considered. It is a recognized rule of law that a man cannot as principal commit rape upon his wife. A man by force has intercourse with a woman whom he believes to be his wife. The woman is not his wife, but resembles her in appearance. Another man, believing by reason of having gone through a marriage ceremony that a woman is his wife, has intercourse with her without her consent. It develops later that the ceremony of marriage was illegal, and the woman was not his wife. In each case the defendant committed the act believing the woman to be his wife; and if his belief had been correct, his act would have been no crime. In the first case the mistake was one of fact, while in the second the mistake was one of law. It does not seem right to convict the defendant in the second case and

¹ *Reg. v. Tolson*, 23 Q. B. D. 168.

² Title is determined by applying law to facts.

acquit him in the first. His mental attitude was the same in each case.¹

In the following cases, where the criminal mind, as distinguished from a specific intent, was negated by a mistake of law as above defined, the courts, though perhaps not conscious of the significance of such a view, held that the defendant had a good defense.

Rex v. Forbes,² 1835. The defendant was indicted for forging P's name as acceptor of a bill of exchange. The defendant offered as a defense that he believed he had the authority to use P's name for that purpose. Coleridge, J., instructed the jury, that if the defendant *bona fide* believed that he had the authority to sign P's name to the bill there was no forgery.³

Regina v. Allday,⁴ 1837. In this case the defendant was indicted under a statute which made it a felony to write some matter or thing, liable to stamp duty, on paper on which previously some other matter liable to stamp duty had been written, before the paper had been again stamped. The defendant, who was authorized to issue licenses for the letting of post-horses, changed the date of a license and the term for which it was to run, under a mistake as to his rights in the matter. Lord Abinger instructed the jury: "It is a maxim older than the law of England, that a man is not guilty unless his mind be guilty. If a person through mistake thought he could alter this license, and send the 7s. 6d. to Somerset House, that would be no felony in law any more than it would be in reason, justice or common sense."

In *Dotson v. State*,⁵ 1869, where there was a prosecution under a statute, which made it an offense for any one to trespass upon another's land by cutting down timber with a view to converting the same to his own use, the following *dictum* appears: "If one commit a trespass upon the land of another, his good faith in the matter or ignorance of the true right or title will not exonerate him from

¹ "Where is the distinction between the mistake of fact which induces a woman to consent to intercourse with a man supposed to be sound in body, but not really so, and the mistake of fact which induces her to consent to intercourse with a man whom she believes to be her lawful husband, but who is none?" Wills, J., in *Reg. v. Clarence*, 16 Cox C. C. 511. The second mistake is clearly one of law, though called mistake of fact.

² 7 C. & P. 224.

³ *Reg. v. Parish*, 8 C. & P. 94 and *Reg. v. Beard*, 8 C. & P. 143, are similar cases, in which the court instructed the jury as in *Rex v. Forbes*.

⁴ 8 C. & P. 136.

⁵ 6 Cold. (Tenn.) 545.

civil responsibility for the act. But when the statute affixes to such a trespass the consequences of a criminal offense, we will not presume that the Legislature intended to punish criminally acts committed in ignorance, by accident, or under claim of right, and in the *bona fide* belief that the land is the property of the trespasser, unless the terms of the statute forbid any such construction."

In *Cutter v. State*,¹ 1873, the defendant, a justice of the peace, was indicted under a statute which provided that "if any justice, etc., shall receive or take by color of his office, any fee or reward whatsoever, not allowed by the laws of this state, he shall be punished, etc." By way of defense the defendant showed that he took the money innocently believing that legally he had a right to the money taken. The court held that to secure a conviction under this statute a criminal mind was necessary, and that this was negated by the defendant's mistake.²

Squire v. State,³ 1874. This was a prosecution for bigamy. The defendant married a second time under the mistaken belief that his former wife had been divorced. The jury convicted the defendant. The court above held there should be a new trial and said *inter alia*: "We think the court should have charged the jury, if it had been so asked, that if they believed from the evidence that the defendant had been informed that his wife had been divorced and that he had used due care and made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe, and did believe, at the time of his second marriage, that his former wife had been divorced from him, they should find him not guilty."

*State v. Goodenow*⁴ is a case commonly cited for the proposition that a mistake of law is no defense. In this case a man and woman were jointly indicted for adultery. They had cohabited as husband and wife while the woman was married to another man. The defendants contended that they should not be punished because they had no criminal mind, and offered evidence that the woman's first husband had married again, and that the justice of the peace who married the defendants told them that

¹ 36 N. J. L. 125.

² The court discusses (p. 127) a case in which a specific intent is made a "necessary constituent of the offense," and seems at this point to regard the principal case as being of this character. An examination of the statute in question reveals the fact that no such intent was made a part of the offense created by the statute.

³ 46 Ind. 459.

⁴ 65 Me. 30.

this marriage of the husband left the wife free to marry again, and the defendants believed this statement to be true. This evidence was rejected. The court above held such rejection proper. The decision, however, was not based upon the ground that the defendants' mistake as to their legal position could be no defense, but upon the ground that they were negligent. This is clearly shown by the following extract from the opinion: "There is no doubt that a person might commit an unlawful act, through mistake or accident, and with innocent intention, when there was no negligence or fault or want of care of any kind on his part, and be legally excused for it. But this case was far from one of that kind. Here it was criminal heedlessness on the part of both of the respondents to do what was done by them." It will be thus seen, that this case instead of being an authority against the present contention is in accord with it. The decision has been greatly misunderstood and it has been held on the supposed authority of this case that a similar mistake was no excuse in cases where there was no negligence.¹

In civil actions the distinction is recognized between a case in which an act is done without knowledge of the law governing that act, and a case in which an act is done under a wrong impression of a former situation produced by applying law to facts.²

It may be objected, that to make a distinction between the terms "ignorance" and "mistake" of law, as has been above attempted, is mere sophistry and for this reason should not be approved. Even if this be granted, it is still submitted that the legal conclusion contended for should be recognized. Where the defendant errs in applying law to facts, thus reaching an incorrect conclusion, and then does an act which would not have been criminal if the conclusion were correct, he should not be convicted, because he does not have the guilty mind.³ Such an error may be said to be a "mistake of

¹ *State v. Whitcomb*, 52 Ia. 85. See also *Hoover v. State*, 59 Ala. 57.

² "Whenever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities or other relation either of property or contract or legal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." *Pomeroy, Eq. Jur.*, § 849.

³ If the mistake fails to negative the criminal mind, for the reasons considered under mistake of fact, or because the defendant was negligent, his mistake should be no defense.

mixed law and fact";¹ or, it may be called a "mistake of fact";² or, it may be stated that when an element of fact enters into the error there can be no conviction, if the criminal mind is negatived; or, it may be said that there should be a defense when a mistake is made concerning a private right as distinguished from a rule of law;³ or, finally, the error may be named "mistake of law" as defined in this article. The phraseology is immaterial. Nevertheless, it is urged that there is a real distinction between such a case and one in which a criminal act is committed with full knowledge of the circumstances, but in ignorance that the act is criminal. It is further urged that this distinction rests upon fundamental principles of criminal jurisprudence.

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¹ Bishop, New Crim. Law, § 311. In *State v. Castle*, 44 Wis. 670, 684, where the defendant mistakenly believed that a certain road was not a highway, Ryan, C. J., said that the validity of the highway was a mixed question of law and fact.

² See Pomeroy, Eq. Jur., § 849. See quotation from opinion of Wills, J., in *Reg. v. Clarence*, 16 Cox C. C. 511 in note on p. 93, *infra*.

³ Kerr, Fraud and Mistake, 398.